IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

SAM ORLANDO,
Petitioner,

vs.

THE STATE OF ILLINOIS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The opinions of the court below

The opinion of the court below will be found in the record (R. 7) and in the Illinois Official Reports (380 Ill. 107).

II.

Jurisdiction

The judgment was entered in the trial court (the Criminal Court of Cook County, Illinois), but a *supersedeas* was allowed by the Supreme Court of Illinois, and as appears from the record herein, that Honorable Court

affirmed the judgment on May 13, 1942. Under the rules that judgment was not made final until a petition for rehearing was denied on September 17, 1942. The Supreme Court of Illinois has the record, a certified transcript of which is filed herewith.

We respectfully submit that this Honorable Court has decided that if a petition for rehearing is entertained by the higher court of a state, its judgment does not become final until the petition for rehearing is denied (*Puget Sound Power & Light Co.* v. *King County,* 264 U. S. 22, 23-25; *Citizens' Bank of Michigan City, Inc.* v. *Opperman,* 249 U. S. 448, 450; *Ohio Public Service Co.* v. *State of Ohio ex rel. Fritz,* 275 U. S. 12; *Chicago G. W. R. Co.* v. *Basham,* 249 U. S. 164; *Iowa-DesMoines Nat. Bank* v. *Stewart,* 283 U. S. 813; *Iowa-DesMoines Nat. Bank* v. *Bennett,* 284 U. S. 239).

Where the court of last resort, as the Illinois Supreme Court in the case at bar, affirms a final judgment of an inferior state court, the judgment of the highest court is the one reviewable (*Lessieur* v. *Price,* 12 How. 59, 72, 13 L. Ed. 893; *Fox Film Corporation* v. *Doyal,* 286 U. S. 123, 126, 52 S. Ct. 546, 76 L. Ed. 1010).

In the case at bar, the federal question was specifically raised in the motion for new trial (Abst. 186) in the trial court and was reasserted in the assignment of errors made in the State Supreme Court (Abst. 197), and therefore we respectfully submit that the Federal question was timely and properly raised. The questions raised were decided against petitioner without any further mention of the right to due process of law as guaranteed by the fourteenth amendment than the following, which we quote from the opinion (R. 15):

> "The final contention of plaintiff in error is that he was deprived of due process of law in violation

> of the Federal constitution. No reason is pointed out in the brief or argument as to why this is so. If its purpose is that it may be said later that a question is involved arising under the Federal constitution it has served that purpose and no other."

As is shown by the record, we contended (Abst. 199) that each of the errors deprived petitioner of due process of law as guaranteed by the fourteenth amendment. The same right to due process is supposed to be secured by our State constitution. It must follow that if the errors herein complained of were committed they were contrary to the rights guaranteed by both governments. We are not here complaining of numerous other errors assigned upon which the State court opinion is final.

We submit that even where the Supreme Court of the State does not expressly pass upon the federal questions, the points are preserved if raised and presented (*Chicago, Burlington & Quincy R. Co.* v. *City of Chicago,* 166 U. S. 226, 231, 232; *Johnson* v. *New York Life Ins. Co.,* 187 U. S. 491, 495; *International Harvester Co.* v. *Missouri ex inf. Attorney General,* 234 U. S. 199, 206, 207; *Erie Railroad Co.* v. *Purdy,* 185 U. S. 148, 154).

Of course, we realize that this Honorable Court must confine itself to the specific federal questions properly raised in the state courts (*Dewey* v. *DesMoines,* 173 U. S. 193, 197, 198).

But, we respectfully submit, the failure of the state court to pass upon the federal questions is not conclusive upon this Honorable Court (*Chicago, Burlington & Quincy Ry.* v. *Illinois ex rel. Drainage Com'rs,* 200 U. S. 561, 580, 581; *West Chicago St. Railroad Co.* v. *Illinois ex rel. City of Chicago,* 201 U. S. 506, 519, 520; *Wood* v. *Chesborough,* 228 U. S. 672, 676-680). This Honorable

Court will determine the inquiry for itself (*Abie State Bank* v. *Bryan*, 282 U. S. 765, 773; *Broad River Power Co.* v. *South Carolina ex rel. Daniel*, 281 U. S. 537, 540; *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, 282; *Patterson* v. *State of Alabama*, 294 U. S. 600, 602; *Ward* v. *Board of County Com'rs of Love County, Okla.*, 253 U. S. 17, 22; *Davis* v. *Wechsler*, 263 U. S. 22, 24, 25).

We respectfully submit that we are not requesting this Honorable Court to re-examine facts tried by the jury. Our respectful contentions concern the legal effect and sufficiency of the facts and the theory upon which the case was submitted below and are questions of law for this Honorable Court (*Kaufman* v. *Treadway*, 195 U. S. 271, 273; *Dower* v. *Richards*, 151 U. S. 658, 667; *Graham* v. *Gill*, 223 U. S. 643, 645; *St. Louis, San Francisco & T. Ry. Co.* v. *Seale*, 229 U. S. 156, 161; *St. Louis, I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S. 265, 277; *Chicago, M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 474; *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668, 673; *Union Pacific R. Co.* v. *Huxoll*, 245 U. S. 535, 538; *Baltimore & Ohio Southwestern R. Co.* v. *Burtch*, 263 U. S. 540, 543; *Brinkmeier* v. *Missouri Pac. R. Co.*, 224 U. S. 268, 270; *Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U. S. 226, 242; *Missouri K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613, 639; *Smiley* v. *Kansas*, 196 U. S. 447, 454; *St. Louis, I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S. 265, 280; *Great Northern Ry. Co.* v. *Donaldson*, 246 U. S. 121, 124; *Southern Railway Co.* v. *Lunsford*, 297 U. S. 398; *Mammoth Mining Co.* v. *Grand Central Mining Co.*, 213 U. S. 72, 73).

Our respectful claim is that the highest court of our State has refused to pass upon the federal questions further than to note the preservation of the points, which questions were properly raised, and which were questions

of substance not heretofore determined by this Honorable Court. As your Honors know, the use of certiorari to correct error is not infrequent in criminal cases.

So, in the case at bar, there can be no question but what there has been:

(1) A final judgment or decree;

(2) The decision sought to be reviewed is by the highest court of the state in which decision could be had;

(3) The judgment or decree was rendered in a "suit" involving a "case" or "controversy";

(4) The case presents substantial federal questions;

(5) The federal questions sought to be reviewed were properly raised and preserved in the state courts; and

(6) The decision of the highest court of the state does not rest upon a state ground which independently and adequately supports the judgment or decree.

So, as your Honors will perceive, the questions in the case at bar narrow themselves down to whether or not substantial federal questions are submitted, which questions, of course, are for decision upon the entire record in the light of the decisions of this Honorable Court and in the exercise of discretion and the supervisory power of this Honorable Court.

Of course, we realize, as was said by Mr. Chief Justice White in *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308:

> "Mere allegation of a Federal question will not suffice; there must be a real substantive question on which the case may be made to turn, that is, a real and not a merely formal Federal question is essential to the jurisdiction."

We respectfully submit that the inquiry whether a substantial Federal question is involved in the case at bar is not dependent entirely upon the merits of the case as they now appear from this Petition. If your Honors will take jurisdiction, we respectfully submit that the merits of our case will more fully appear. We only ask to have a chance to print the record and show the injustice done, because of which we respectfully claim the writ.

III.

Statement of the Case

The questions which we claim to be Federal can be presented without burdening this court with many details of the trial.

The defendant waived a jury but the People demanded one and the defendant was compelled to submit his case to a jury when he did not choose to exercise that right.

The defendant had been tried and acquitted upon what he contends was the same offense. The record shows the first (Abst. 19) and the second (Abst. 7, 11) indictment. The facts proved and the witnesses were the same in both trials. The trial court and the Supreme Court has held that there was no jeopardy because the offenses are not alike. In our argument we marshall the salient facts in support of our contention that the State courts erred and jeopardy existed.

When the defendant was arrested and taken to the office of the State's Attorney he was asked questions in the presence of a stenographer. He answered some and as to others he stood upon his constitutional rights. This, we contend, deprived him of the right not to incriminate himself and violated the due process clause.

The sentence is for ten years. The laws are so framed that the prosecutor is given the power, as he did in this case, to dismiss certain counts and to cause the same acts to be punishable with a light or heavy sentence.

IV.

Specification of Errors

Your petitioner contends the following, which is repeated from his petition wherein he sets up under B his reasons relied upon for the allowance of the writ.

1. When the defendant waived a jury the constitution and laws of Illinois did not give the State the right to demand and secure a jury trial over the objection of the defendant. It was specifically claimed at the time in the trial court (Abst. 28) that due process of law as guaranteed by the fourteenth amendment to the Federal constitution was violated. Although the point was again urged as a Federal question upon the Supreme Court (Abst. 197, 198, points 6 and 26), relief was denied.

2. Your petitioner had been previously tried and acquitted for what he claims to be the same offense. The trial court held (R. 12), as a matter of law, that the offenses were not the same, and the Supreme Court of Illinois sustained this view. The question was presented to the trial court (Abst. 188) as an error depriving your petitioner of Federal rights and again as a Federal question to the Supreme Court (Abst. 199). The Supreme Court held that the offenses were not the same. This, we contend, is error.

3. The prosecutor was permitted to show, over objection, that your petitioner had previously stood upon his constitutional rights to refuse to answer questions in the office of the State's Attorney. This point was preserved as a Fed-

eral question in the trial court (Abst. 188) and in the Supreme Court (Abst. 199). The Supreme Court found contrary to the record that there had been no objection and that no prejudice was shown (R. 13). It is contended that this was a denial of due process of law as guaranteed by the fourteenth amendment.

4. The punishment of ten years in the penitentiary amounts to cruel and unusual punishment.

Brief

I.

Forcing a trial by jury upon a defendant in disregard of his waiver thereof violated the right of petitioner to due process of law as guaranted by the constitution and laws of this State as well as by the fourteenth amendment to the constitution of the United States.

People v. *Andrae,* 295 Ill. 445.
People v. *Scornavache,* 347 Ill. 403, 416.
Patton v. *United States,* 281 U. S. 276.

II.

The effect of the constitutional provisions in respect of trial by jury is not to establish a tribunal as a part of the frame of government, but only to guarantee to the accused the right to such a trial.

Patton v. *United States,* 281 U. S. 276, 293.

III.

The view that power to waive a trial by jury in criminal cases should be denied on grounds of public policy is rejected as unsound.

Patton v. *United States,* 281 U. S. 276, 308.

IV.

The power of waiver of jury trial by the defendant in a criminal case is applicable to cases of felonies as well as to misdemeanors.

Patton v. *United States,* 281 U. S. 276, 309.

V.

Under his plea of not guilty a defendant in Illinois is entitled to prove any defense to the charge including that of former jeopardy and acquittal.

People v. *Greenspawn*, 346 Ill. 484, 486.

VI.

When the question of former jeopardy is presented at a second trial the question of identity of offenses can be inquired into by an inspection not only of the former judgment but of the pleadings and the evidence and all matters which may disclose the real situation.

Harding Co. v. *Harding*, 352 Ill. 417.
Neil v. *Chavers*, 348 Ill. 326.
Petition of Blacklidge, 359 Ill. 482.
Hoffman v. *Hoffman*, 330 Ill. 413.
Smith v. *Auld*, 31 Kan. 262, 1 Pac. 626, 628.
Davis v. *People*, 22 Colo. 1, 43 Pac. 122.

VII.

An indictment might be so drawn as to allege a conspiracy to do an act, and further that the act was consummated, and be an indictment for the consummated act and not the conspiracy. In such case the allegation of conspiracy would be surplusage.

People v. *Darr*, 255 Ill. 450, 463.

VIII.

Where concert is necessary to offense, conspiracy does not lie.

Wharton's Criminal Law, Vol. II, sec. 1604, p. 1862.

IX.

The test as to whether the facts pleaded or proved constitute a former acquittal or conviction sufficient to bar a subsequent prosecution is whether the facts charged in the later indictment would, if found to be true, have justified a conviction on the earlier indictment. If they do, then the judgment on the earlier indictment is a complete bar to a prosecution on the other indictment, otherwise not.

People v. *Bain*, 358 Ill. 177, 190.

People v. *Mendelson*, 264 Ill. 453.

X.

To compel a citizen of the United States to proceed to trial a second time after his acquittal constitutes double jeopardy and is in violation of rights guaranted by the fourteenth amendment.

Ex parte Ulrich, 42 Fed. 587.

XI.

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Art. II, sec. 10, Illinois Constitution of 1870.

XII.

If a defendant refuses to answer questions in accordance with his constitutional right to keep silent, neither his silence nor the fact that he availed himself of his constitutional right are admissible against him.

People v. *Kozlowski*, 368 Ill. 124, 127.

People v. *Pfanschmidt*, 262 Ill. 411, 451.

XIII.

A new trial should be awarded where it appears that the prosecuting attorney has overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.

Berger v. *United States*, 295 U. S. 78.
United States v. *Perlstein*, 120 F. (2d) 276 (283).
Beck v. *United States*, 33 F. (2d) 107.
Nations v. *United States*, 32 F. (2d) 598.
Read v. *United States*, 42 F. (2d) 636.
Taliaferro v. *United States*, 47 F. (2d) 699.
Hale v. *United States*, 25 F. (2d) 430.
Volkmor v. *United States*, 13 F. (2d) 594.

XIV.

To permit a prosecutor to show the jury over objection that the defendant stood upon his constitutional right to remain silent when questioned during the investigation destroys the rights guaranteed by the State constitution and protected by the fourteenth amendment.

Vol. 16, C. J. S., p. 1148, sec. 568.
United States v. *Sprengel*, 103 F. (2d) 876.

XV.

The punishment of ten years in the penitentiary amounts to cruel and unusual punishment prohibited by the constitution and laws of Illinois, and such punishment, resulting after the undue influence of the prosecutor and the county

judge on the witnesses, is excessive and should be set aside.

People ex rel. Rusch v. *Cunningham*, 308 Ill. App. 63.

People ex rel. Tauer v. *Brown*, 309 Ill. App. 443

People ex rel. v. *Garbacz*, 309 Ill. App. 443.

People v. *Clark*, 301 Ill. 428, 434.

XVI.

The law relative to punishment must operate equally on every citizen of the State.

16 C. J. S., sec. 564, p. 1137.

XVII.

A state may not deny any person within its jurisdiction the equal protection of the laws.

Truax v. *Corrigan*, 257 U. S. 312.

V.

Argument

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

A.

Jury Waiver

The Illinois Supreme Court said in *People* v. *Scornavache*, 347 Ill. 403, 416:

> "From what has been said it must be apparent that in the absence of constitutional or statutory inhibition the court has the power, and upon objection by the People it is its duty, to submit the issues of fact in a criminal case to a jury notwithstanding a waiver of jury trial by the accused."

Since the above decision the legislature has remedied the situation, but the statute (Laws of Ill., 1941, p. 574, approved July 15, 1941) had not gone into effect at the time of the trial below. The present judgment was entered June 13, 1941 (Abst. 18). We respectfully submit that in holding that the defendant could not waive a jury the trial court violated the right of plaintiff in error to due process of law as guaranteed by the Constitution and laws of this State as well as by the fourteenth amendment to the Constitution of the United States.

Your Honors will find that the *Scornavache* case was decided by a four to three split in the Illinois Supreme Court. The dissenting opinion is reported, and contains much of our argument. Your Honors will note that the

case of *Patton* v. *U. S.*, 281 U. S. 276, is cited and relied upon. We realize that we can not now be heard to say that the majority was wrong and the minority right. We must accept and be bound by the majority opinion. But we find therein no mention of any Federal question, and, insofar as the opinion discloses, such question was not raised or considered. So we here present argument new to the question and adopt the minority opinion in support thereof.

We assume, for the purpose of argument, that the State of Illinois could ordain that every defendant must take a jury. Your Honors would not be concerned whether this was to be found in the constitution, in the acts of the Legislature or in the decisions of the courts. But if any of these agencies of the State said we'll compel such defendants as may be chosen by the prosecutor to stand trial before a jury, discrimination is not only made possible, but your Honors would perceive that such a rule was intended to allow the prosecutor to discriminate. There would be no equal protection of the laws. It is only fair to assume in the case at bar that your petitioner was advised, or had reason to believe, that he stood a better chance of a fair trial before the court. Also that the prosecutor believed he would have the advantage before a jury. It is not the policy of the law to allow the prosecutor to secure an advantage. Many of the rights given a defendant are not secured to the prosecutor, the right to a change of venue, for instance.

So your petitioner, a citizen of the United States, claims that the enforcement of the law as announced by the majority opinion in the *Scornavache* case, deprived your petitioner of due process of law as guaranted by the fourteenth amendment.

B.

Former Jeopardy

As the State put in its case, the defendant showed on cross-examination that the various witnesses called by the State had testified in the previous trial before Judge Graber where the defendant had been acquitted (Abst. 60, 63, 66, 67, 68, 69, 77, 78, 79, 99, 123). From the fact that counsel on both sides confronted the various witnesses who had testified before with any discrepancies, it is fair to conclude from the entire record that the testimony as to the occurrences in the polling place was substantially the same in both trials; that the State relied upon the same proof in each case.

After the People rested their case in chief the defendant called the deputy clerk of the Criminal Court (Abst. 142) and undertook to prove the record of the previous trial, showing the acquittal of Orlando and Vinci before Judge Graber. The prosecutor objected and the court sustained the objection (Abst. 144) upon the ground that such acquittal did not bar the present prosecution for the reason that the charge was not the same. The previous indictment (Abst. 19) charged conspiracy. It is our respectful contention that the trial court erred and should have allowed the proof and should have held that the charge in the previous case and in the case at bar are the same.

We understand that ordinarily conspiracy and the substantive offense alleged to be the object of the conspiracy are regarded as separate offenses, as held in *People* v. *Darr*, 255 Ill. 456, 462, but there are exceptions and we respectfully contend that in the case at bar the charges in the two trials are alike.

The courts seem to be in agreement to the effect that

when the question of former jeopardy is presented at a second trial the bothersome question of identity of offenses can be inquired into by an inspection not only of the former judgment, but of the pleadings and the evidence and all matters which may disclose the real situation (*Harding Co.* v. *Harding,* 352 Ill. 417; *Neil* v. *Chavers,* 348 Ill. 326; *Petition of Blacklidge,* 359 Ill. 482; *Hoffman* v. *Hoffman,* 330 Ill. 413; *Smith* v. *Auld,* 31 Kan. 262, 1 Pac. 626, 628).

We respectfully quote from 22 CORPUS JURIS SECUNDUM, Criminal Law, sec. 278:

> "There is a great diversity of judicial decision touching upon the question of former jeopardy and the courts are in hopeless conflict when it comes to a solution of the problem of identity of offenses, although they ordinarily agree as to the general principles, the lack of harmony being in applying them to the facts, and it has been said that this is probably due to the fact that the tests commonly adopted are by no means infallible.
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> "The term 'same offense' however, does not signify the same offense *eo nomine,* but the same criminal act, transaction, or omission, and it is not essential, to sustain a plea of former jeopardy that the indictment or information be in identical language, nor that the proofs in the two prosecutions be identical; it is sufficient if an acquittal of the offense cha.ged in the first indictment virtually includes an acquittal of that set forth in the second, however, much they may differ in degree, and it has been held that a judgment in a criminal case is a bar to a subsequent prosecution for any offense which could have been proved under the indictment."

The case of *Davis* v. *People,* 22 Colo. 1, 43 Pac. 122, illustrates our respectful contention. Two defendants were placed upon trial for robbery and pleaded former jeopardy on the ground that there was a former trial wherein the

same defendants were charged with conspiracy to commit the same robbery. The defendants were a man and a woman. The court announced the general rule that conspiracy to commit an offense and the commission of the offense are two separate offenses, and a prosecution in one does not generally bar the other. But upon examining the plea and that which was said by counsel below, it appeared that the man was prosecuted in the former case (wherein he was acquitted) on the theory that he was an accessory not present at the commission of the crime (although the indictment in the former case charged him with being a principal, as did the second indictment). So the Colorado court concluded that there was necessarily a conspiracy in both the subsequent and the present offense and that it was error to overrule the plea. On the other hand, the woman, who had been convicted in the former trial, was held to be in a different position, and there was no error in overruling her plea for the reason that she was a principal, and it was not necessary to prove a conspiracy as against her in the case then under consideration.

Permit us to compare the two cases, the previous trial before Judge Graber with the case at bar tried before Judge Bolton. It will be seen that the same parties are involved, the date of the alleged crimes and the occasion of their commission at the election held June 5, 1939, in Chicago, Cook County, Illinois, in the 52nd Precinct of the 11th Ward, under the provisions of the City Election law is involved in both cases. We shall omit the charges upon which Orlando has been acquitted in the case at bar and narrow our comparison of the two cases to the verdict and judgment in the case at bar, with so much of the indictment which is pertinent, with the charge and the evidence (insofar as it is here shown) in the former case. We repeat that in the case at bar Orlando has been found guilty of (Abst. 18):

"advising, procuring and abetting the falsifying of a poll list, in manner and form as charged in the indictment."

In the former indictment (Abst. 19) there is to be found the following, as one of the objects of the alleged conspiracy (Abst. 24):

"and to add and enter upon the poll books of said precinct at said election and cause, advise, induce, procure and abet the aforenamed judges of election and clerks of election to unlawfully, wrongfully, fraudulently and corruptly add and enter upon said poll books of said precinct at said election the names of a large number, to-wit: one hundred, of qualified electors of said precinct at said election, thereby causing it to appear that said last mentioned electors had voted at said election, when in truth and in fact said last mentioned voters did not vote at said election."

And further that (Abst. 25):

"And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that in furtherance of the objects of said conspiracy said Sam Orlando and said Joseph Vinci, neither of whom was a judge of election nor a clerk of election of said precinct at said election, then and there counseled and advised said judges of election and clerks of election as to the respective number of votes that should be credited in said precinct to divers candidates at said election, and while said election was in progress then and there entered voting booths in said polling place when said respective voting booths were occupied by respective electors of said precinct engaged in marking their respective ballots, and then and there looked at said ballots, and while said election was in progress, then and there at said polling place marked and assisted in marking the respective ballots of divers electors of said precinct who then were not illiterate and who then could read the English language and who then were not blind or intoxicated, and of divers electors of said precinct who then were not, by reason of physical disability, unable to mark their respective

ballots in said precinct at said election and who then were not blind nor intoxicated, and then and there caused and induced a large number, to-wit, fifty, of qualified electors of said precinct who did not vote in said precinct at said election and who did not come to said polling place at said election to sign and deliver to said Sam Orlando and said Joseph Vinci respective applications for ballots at said election, purporting to show that a person offering to vote at said election was the same person who was a registered voter of said precinct registered under the same name, and purporting to identify such person so offering to vote by a comparison of the signature on said application with the signature of such registered voter then accessible to said judges and clerks of election, and then and there without authority wrote, signed and forged on a large number, to-wit, fifty others of such applications for ballots at said election, the respective names and purported signatures of a large number, to-wit, fifty, of other qualified electors of said precinct who did not vote in said precinct at said election, and after the closing of the polls at said election then and there handled large numbers of the ballots cast in said precinct at said election and then and there took part in counting the votes cast in said precinct at said election and then and there erased and effaced from divers of the ballots cast by electors in said precinct at said election certain crosses and X-marks placed on said last mentioned ballots in the squares in front of and opposite the names of certain candidates appearing on said ballots, and then and there wrote, inserted and added on certain of the ballots cast by electors in said precinct at said election certain crosses and X-marks in the respective squares in front of and opposite the names of certain candidates appearing on said ballots, whereas no cross or X-mark had been placed in any of said respective squares in front of and opposite the names of said respective candidates by the respective electors casting said respective last named ballots; contrary to the Law and against the peace and dignity of the same People of the State of Illinois."

So your Honors will perceive that the pleader in the former indictment alleged not only that the defendant Orlando conspired to falsify the poll list, but that he did certain things in order to aid in falsifying the poll list. In other words, the charges in each indictment embrace the charges in the other indictment. Orlando was charged as an accessory before the fact in both cases. In both cases it was necessary to prove a conspiracy between Orlando and a judge or clerk and in both cases it was necessary to prove that Orlando aided the judges and clerks in advising, procuring and abetting the falsifying of a poll list.

As was said by Mr. Justice Cartwright in *People* v. *Darr*. 255 Ill. 450, 463:

> "An indictment might be so drawn as to allege a conspiracy to do an act, and further that the act was consummated, and be an indictment for the consummated act and not the conspiracy. In such case the allegation of conspiracy would be surplusage."

We respectfully submit that the case at bar is even stronger than the case supposed by Mr. Justice Cartwright. The consummated act in the case at bar is the assistance and aiding of the judges and clerks. This charge makes a conspiracy necessary in both cases. The jury before Judge Graber said that Orlando did not aid the judges and clerks to falsify the poll list.

The reason for the general rule that a former conspiracy case will not bar a present substantive case seems to be that it is possible in most instances to commit the crime of conspiracy without the commission of the substantive offense. The unlawful agreement is the crime ordinarily charged in conspiracy. We respectfully contend that where the reason for the rule fails the rule should fail. In adultery, bigamy, dueling, and such crimes

requiring concert of action, the parties can not be guilty of conspiracy. In the case at bar Orlando could not aid the judges without conspiring with the judges. It is our contention that, comparing the indictment in the former case with the case at bar, the same crime has been alleged in each. The label on the former indictment and the conclusion of the pleader that a conspiracy was charged in the former prosecution does not matter. We respectfully submit that Orlando was charged with the same crime in both instances, and the former acquittal is a bar under our constitution and laws, as well as under the guarantee of the fourteenth amendment to the constitution of the United States.

We respectfully quote from Wharton's Criminal Law, Vol. II, sec. 1604, p. 1862:

> "Where concert is necessary to offense, conspiracy does not lie. When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. As crimes to which concert is necessary (*i. e.*, which cannot take place without concert), we may mention dueling, bigamy, incest, and adultery; to the last of which the limitation here expressed has been specifically applied by authoritative American courts. We have here the well-known distinction between *concursus necessarius* and *concursus facultativus;* in the latter of which the accession of a second agent the offense is an element added to its conception; in the former of which the participation of two agents is essential to its conception, and from this it follows that conspiracy, the gist of which is combination, added to crime, does not lie for *concursus necessarius.* In other words, when the law says, 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense—*e. g.*, adultery—shall

> have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy. Of course when the offense is not consummated, and the conspiracy is one which by evil means a combination of persons is employed to effectuate, this combination is of itself indictable. And hence, persons combining to induce others to commit bigamy, adultery, incest, or dueling, do not fall within this exception, and may be indicted for conspiracy."

So, we respectfully submit that when the pleader attempted to describe the crime in the former case as conspiracy, there being no such crime possible, and an inspection of the indictment revealing that the pleader had described the very crime which was charged in the case at bar, the conclusion of the pleader in the former case that a conspiracy existed should be rejected as surplusage.

As was said in *People* v. *Bain*, 358 Ill. 177, 190:

> "The test as to whether the facts pleaded or proved constitute a former acquittal or conviction sufficient to bar a subsequent prosecution is whether the facts charged in the later indictment would, if found to be true, have justified a conviction on the earlier indictment. If they do, then the judgment on the earlier indictment is a complete bar to a prosecution on the other indictment, otherwise not. (*People* v. *Mendelson*, 264 Ill. 453.)"

We respectfully submit that in the case at bar the facts charged in the present indictment would, if true, have justified a conviction on the earlier indictment.

Although the Illinois Supreme Court said (R. 12):

> "It is clear that the crime for which defendant in error was tried in this case was an entirely separate offense from the charge of a conspiracy to commit such offense."

we submit that such is not the case as shown by the record.

Although the finding of our Supreme Court, even if divided, is entitled to great respect, we understand that your Honors are privileged to examine the record and the law to determine the correct solution. It will be conceded, no doubt, that if in fact these cases are alike in law and fact, and your petitioner was acquitted in a previous trial, this conviction is in violation of due process as guaranteed by the fourteenth amendment. *Ex parte Ulrich*, 42 Fed. 587.

C.

Self Incrimination.

The error of the trial court, we respectfully submit, appears from the following quotation from the record (Abst. 160):

> "Mr. Austin (the prosecutor): Q. And you told him that you wanted to take advantage of your constitutional rights—
>
> "Mr. Stewart (attorney for petitioner): Object to that. Just a minute, your Honor.
>
> "Mr. Austin: Q. —and refused to answer.
>
> "Mr. Stewart: I object to that.
>
> "The Court: What is that?
>
> "Mr. Stewart: Object to that, and the defendant has a right.
>
> "Mr. Austin: I am not questioning him his rights.
>
> "Mr. Stewart: My objection is a prosecutor has no right to even ask a defendant if he at one time stood on his constitutional rights.
>
> "The Court: Objection overruled.
>
> "Mr. Stewart: Exception.
>
> "The Witness (the defendant): I think the question 'Do you wish to take advantage of your constitutional rights and refuse to answer?' was asked me, and my answer, 'A. I do.'"

As was said in *People* v. *Pfanschmidt,* 262 Ill. 411, 451:

> "Our Criminal Code has provided, for three-quarters of a century, that the failure of the accused to testify shall not create any presumption against him nor shall the court permit any comments to be made upon such silence."

After reviewing the authorities, this Honorable Court said in *People* v. *Kozlowski,* 368 Ill. 124, 129:

> "While it is true that the crystallization of human experience shows it is contrary to men's habits and nature to permit accusatory statements to go unchallenged unless the accused person is repressed by the appalling fact that the statement is true, yet, testimony as to silence of an accused person is merely some evidence from which the jury may draw an inference that the accused acquiesced therein. The circumstances surrounding the accused at and before the accusation was made must show that he was afforded an opportunity to enter a denial or objection. If men similarly situated would not have felt at liberty to deny such statements or have felt called on to do so, in the event that they did not intend to express assent or acquiescence by their failure to respond, neither the statements nor the fact of silence are admissible in evidence."

It is fair to assume that Orlando had every reason to believe from what he must have learned at the experiences of others at the hands of the prosecutor in the State's Attorney's office that his interests would be best served by remaining silent. Our constitution and laws gave him that right which the prosecutor well knew, and we have a right to assume that this Honorable Court has said that the fact of a defendant's silence should not be shown. Such conduct, we respectfully submit, is unfair and was intended to, and must have, prejudiced the jury.

The Illinois Supreme Court said upon this subject (R. 13):

> "It is further agreed that plaintiff in error was prejudiced because the State's Attorney was permitted to ask him if he had not at one time, in connection with the investigation growing out of the election, claimed his constitutional rights and had refused to answer questions propounded to him, by the State's Attorney, on that ground. This matter arose during the course of defendant's testimony concerning the first meeting with the State's Attorney. It was shown without objection that the defendant told the State's Attorney at that meeting that he did not care to answer any more questions. He was then asked if he had elected to stand on his rights and refused to answer on that ground, and his answer was 'yes'. The subject was then dropped and not pursued further. The record does not show that any harm or prejudice resulted to the defendant from this incident."

We contend that whether there was harm or prejudice is a matter of opinion, and your Honors are not bound by the opinion of the State Court, when the facts are before this court. The spirit of the previous decisions of the State court is that a defendant not only has a right to refuse to answer, but the fact that he has availed himself of that right can not be shown. Your Honors know that the right to silence would be an empty shadow if the prosecutor could bring such fact before the jury.

With all due respect to the Illinois Supreme Court, it is obviously in error in concluding that there was no objection, as the record discloses objections. In our petition for rehearing we said (R. 17, p. 22):

Your Honors say as to the misconduct of the State's Attorney in showing the fact that Orlando stood upon his constitutional rights that (p. 7):

"The record does not show that any harm or prejudice resulted to the defendant from this incident."

Your Honors say that (p. 7):

"It was shown without objection that the defendant told the State's Attorney at that meeting that he did not care to answer any more questions."

There was nothing much to object to up to this point. It may have been best not to aggravate the matter by objection. Maybe the unfairness of the prosecutor escaped the jury up to this point. But there appears the following (our brief, p. 61; Abst. 160):

"Mr. Austin: Q. And you told him that you wanted to take advantage of your constitutional rights—

"Mr. Stewart: Object to that. Just a minute, your Honor.

"Mr. Austin: Q. —and refused to answer.

"Mr. Stewart: I object to that.

"The Court: What is that?

"Mr. Stewart: Object to that, and the defendant has a right.

"Mr. Austin: I am not questioning him his rights.

"Mr. Stewart: My objection is a prosecutor has no right to even ask a defendant if he at one time stood on his constitutional rights.

"The Court: Objection overruled.

"Mr. Stewart: Exception."

Your Honors say (p. 7):

"The subject was then dropped and not pursued further."

Your Honors will see upon rehearing that the subject was not dropped (Abst. 160). But the harm was done when the prosecutor illegally demonstrated the fact that the defendant availed himself of his right. We again refer your Honors to *People* v. *Pfanschmidt*, 262 Ill. 411, 451, and *People* v. *Kozlowski*, 368 Ill. 124, 129 (our brief, p.

61). Your Honors must know that the constitutional right to silence is of no practical value if the prosecutor is permitted to show that it was claimed. The prejudice follows as night follows day. Even a slight knowledge of juries should be sufficient to understand the reason behind the holding of this court in *People* v. *Kozlowski*, 368 Ill. 124, 129 (our brief, p. 62) that:

> "neither the statements nor the fact of silence are admissible in evidence."

We do not expect your Honors to consider our petition for rehearing as such, but it not only shows our position, which we again assume here, but it shows that this error was specifically pointed out to our Supreme Court with reasons which we contend are sound under the rights protected by the federal constitution.

It cannot be denied that the fourteenth amendment requiring due process of law to petitioner, a citizen of the United States, by the State officials, prohibits such misconduct upon the part of the prosecutor. We contend that when the trial court and the Supreme Court refused to correct the error which was timely and persistently presented as a Federal question, it is the duty of this court to enforce the rights of your petitioner and to correct the flagrant error in this regard.

We are aware of the fact that this court held in *Twining* v. *New Jersey*, 211 U. S. 78, exemption from compulsory self-incrimination in the State courts is not secured by any part of the Federal constitution. But New Jersey had no constitutional provision, as most states do, such as we have in Illinois (Art. II, sec. 10), against self-incrimination. We quote from Corpus Juris Secundum, vol. 16, sec. 568, Constitutional Law, p. 1148:

> "Due process in the Fourteenth Amendment is due process according to the constitution and the

laws of the particular state, and not the process of another state or of the United States, what due process requires in one state not necessarily being due process in another."

D.

Punishment

The indictment does not specify any particular section of the Statute as having been violated. The inducement refers to the Act of 1885 as amended, commonly called the City Election Law.

If we understand the claim of the prosecutor and the judgment of the Court, the particular section of the City Election Law as amended, said to have been violated, is as follows:

> "Every person not an officer, such as is mentioned in the last preceding section, who is guilty of any of the acts specified in said last section, or who advises, procures or abets the commission of the same, or any of them, shall upon conviction thereof be adjudged guilty of a felony, and for each and every such offense shall be punished by imprisonment in the penitentiary for not less than one year nor more than ten years. And such offense shall be deemed to have been committed whether such person has or had any custody or control, rightful or otherwise, over, or is charged with any duty in relation to, said records, register, ballots or other documents." (Ill. Rev. Stat. 1941, Ch. 46, sec. 259.)

The preceding section referred to is as follows:

> "Every judge of election, poll clerk or other officer or person having the custody of any record, register of voters or copy thereof, oath, return or statement of votes, certificate, poll list, or of any paper, document or vote of any description, in this act directed to be made, filed or preserved, who is guilty of steal-

ing, wilfully destroying, mutilating, defacing, falsifying or fraudently removing or secreting the whole or any part thereof;

"Or who shall fraudulently make any entry, erasure or alteration therein, except as allowed and directed by the provisions of this act;

"Or who permits any other person so to do;

"Shall, upon conviction thereof, be adjudged guilty of a felony, and shall be punished for each and every such offense by imprisonment in the penitentiary for not less than one year nor more than ten years." (Ill. Rev. Stat. 1941, Ch. 46, Sec. 258.)

The jury rejected the form of verdict, making use of the words wilfully and fraudulently (Instruction No. 26, Abst. 180).

The City Election law contains the following:

"Officers—Violation of election laws.) 7. If any judge of election, poll clerk or other officer of registration, revision, election, or canvass, of whom any duty is required, in this act, or by the general election laws of this state, so far as the same are consistent with the provisions of this act, shall be guilty of any willful neglect of such duty;

"Or of any corrupt or fraudulent conduct or practice in the execution of the same;

"He shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and shall be punished by imprisonment in the county jail for not less than three months nor more than one year."

Ill. Rev. Stat., 1941, Chap. 46, Sec. 257.

There is also the following, which we respectfully quote from the City Election law:

"Offenses in connection with elections in city, village or town—Penalty.) If, at any election hereafter held in any such city, village or incorporated town, any person shall falsely personate any elector or other person, and vote or attempt or offer to vote in, or under the name of such elector or other person;

* * * * *

"Or by any such means, or other unlawful means, knowingly, wilfully or fraudulently counsel, advise, induce or attempt to induce any judge of election, poll clerk or other officer of election whose duty it is to ascertain, proclaim, announce, or declare the result of any such election, to give or to make any false certificate, document, report, return or other false evidence in relation thereto;

* * * * *

"Or shall aid, counsel, advise, procure or assist any voter, person or judge of election, or other officer of election, to do any act by law forbidden or in this act constituted an offense;

* * * * *

"Every such person, upon conviction thereof, shall be adjudged guilty of a misdemeanor, and shall be punished by imprisonment in the county jail for not less than three months nor more than one year."

Ill. Rev. Stat. 1941, Ch. 46, Sec. 252.

Then there is the following:

"False lists or entries.) If any election clerk or poll clerk, or any judge of election, performing the duties of poll clerk, or other person performing such duties, shall wilfully keep a false poll list;

"Or shall knowingly insert in his poll list any false statement, or any name or statement, or any check, alteration or mark, except as in this act provided;

"He shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and shall be punished by imprisonment in the county jail for not less than three months nor more than one year."

Ill. Rev. Stat. 1941, Ch. 46, Sec. 253.

How can your Honors determine from the indictment and the verdict that the jury did not intend that Orlando be punished under this section? If such were their intention the penalty should not have been a penitentiary sentence.

Under the circumstances we contend that the punish-

ment of ten years in the penitentiary amounts to cruel and unusual punishment prohibited by the constitution and laws of this State, and such punishment, resulting after the undue influence of the prosecutor and the county judge on the witnesses, is excessive and should be set aside (*People ex rel. Rusch* v. *Cunningham,* 308 Ill. App. 63; *People ex rel. Tauer* v. *Brown,* 309 Ill. App. 443; *People ex rel.* v. *Garbacz,* 309 Ill. App. 443; *People* v. *Clark,* 301 Ill. 428, 434). It follows, of course, that if the punishment is cruel and unusual, that such sentence is in violation of the right to due process of law as guaranteed by the fourteenth amendment.

We are aware of the fact that the provision of the Federal constitution prohibiting cruel and unusual punishments is confined in its operation to the Legislature and the Judiciary of the United States, and that this court will not take jurisdiction to inquire into the extent of a penitentiary sentence within the State law, but when and if your Honors take jurisdiction on the other grounds put forth, we believe we have a right to call attention to the sliding scale of punishments allowed, the wide range of selection afforded the prosecutor and his abuse of his great powers in the case at bar.

As was said by this Honorable Court in *Berger* v. *United States,* 295 U. S. 78, 88, concerning the prosecutor:

> "He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Further that (89):

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or

> confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded."

It is fundamental that by virtue of a clause in the fourteenth amendment a State may not deny to any person within its jurisdiction the equal protection of the laws (*Truax* v. *Corrigan*, 257 U. S. 312). Generally speaking, the law relative to the punishment to be inflicted for a crime must operate equally on every citizen of the State (16 Corpus Juris Secundum, Sec. 564, p. 1137).

We respectfully pray that the writ be allowed and submit that upon the hearing and a full study of the record the errors will appear. As your Honors observed in *Moore* v. *Dempsey*, 261 U. S. 86, a proceeding legal in form can be but a mask. Such, we contend, is the proceeding at bar, a culmination of errors had the effect of depriving your petitioner of due process of law.

Respectfully submitted,

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